No. 13,969

IN THE

United States Court of Appeals

For the Ninth Circuit

LEO WING ON and LEO WING WAH,
Appellants,

vs.

J. HOWARD MCGRATH, Attorney General of the United States,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The appellants herein filed a petition seeking declaratory judgment of United States nationality in the United States District Court for the Northern District of California. They allege jurisdiction under the provisions of Section 503 of the Nationality Act of 1940, 8 U.S.C.A. 903.

A motion to substitute the party defendant was filed by appellants more than six months after defendant J. Howard McGrath had vacated the office of Attorney General of the United States. This motion was

granted. A motion to dismiss on the ground of abatement was filed by appellee. This motion was heard by a different District judge, who thereupon vacated the order granting the substitution and dismissed the complaint. The appeal herein is from the latter order.

Appellants assert jurisdiction in this Court under 28 U.S.C.A. 1291. The prayer of appellee's motion to dismiss asks for the dismissal of "the complaint on file in the above action." The order of the Court below granted the motion to dismiss and dismissed the complaint.

The Court's attention is first directed to whether or not the order from which appeal was taken is an appealable order.

Monge v. Smyth, C.A. 9, 1952, 198 F. 2d 749.

Hoiness v. United States, 335 U.S. 297.

United States v. State of Arizona, C.A. 9 No. 13722. Certiorari granted and reversed by the Supreme Court of the United States on December 7, 1953.

The question of the jurisdiction of the District Court to hear the claim of citizenship by an alien who has never been in the United States has been briefed in the following appeals before this Court: No. 13745, *Fong Wone Jing v. Dulles*; No. 13746, *Chow Sing v. Brownell*; and No. 13808, *Ly Shew v. Dulles.* The complaint in the above appeal (Tr. 6) discloses that appellants were born in China and claim citizenship by derivation through their alleged father. The lack of jurisdiction in this case on the same grounds as

specified in Fong Wone Jing, Ly Shew and Chow Sing is likewise asserted herein.

STATUTES AND RULES INVOLVED.

(1) Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) provides, insofar as pertinent here:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States."[1]

(2) Rule 25(d) of the Federal Rules of Civil Procedure provides:

> "When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city or other governmental agency, is a party to an ac-

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[1]This statute has since been repealed by the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1101, et seq.) which became effective December 24, 1952. The Savings Clause Section 405(a) continues the statute in force as to suits which were on file and pending before the new Act became effective (66 Stat. 280) but would not permit the filing of such suits now.

tion and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within six months after the successor takes office it is satisfactorily shown to the Court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object."

(3) Rule 6(b) of the Federal Rules of Civil Procedure provides:

"When by these rules or by a notice given thereunder or by order of Court an act is required or allowed to be done at or within a specified time, the Court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and

(g), except to the extent and under the conditions stated in them.

(4) Title 28 U.S.C.A. 2072, Rules of Civil Procedure for District Courts, provides:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the District Courts of the United States and of the District Court for the Territory of Alaska in civil actions.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at the beginning of a regular session and until after the close of such session.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

STATEMENT OF THE CASE.

The appellants herein are natives of China. They first arrived in the United States at San Francisco, California, on July 12, 1951, at which time they were

excluded by a Board of Special Inquiry on the ground that they are aliens and not citizens of the United States. The excluding decision of the Board of Special Inquiry was affirmed by the Commissioner of the Immigration and Naturalization Service and by the Board of Immigration Appeals. Appellants then filed the present action in the Court below under Section 503 of the Nationality Act.

On December 12, 1952, the appellants filed a motion under Rule 25(d) of the Rules of Civil Procedure to substitute James P. McGranery for J. Howard McGrath. J. Howard McGrath had vacated his office on May 27, 1952, and more than six months had elapsed before the motion to substitute was filed. The motion to substitute was granted by Judge Harris. A motion to substitute Herbert Brownell, Jr., for James P. McGranery was then filed and granted. On May 25, 1953, a motion to dismiss the complaint was filed, and was granted by Judge Murphy on June 3, 1953. In granting the motion to dismiss, the judge vacated both prior orders granting substitution of party defendant.

STATEMENT OF POINTS.

Appellants rely on the following points:

(1) The Court below erred in holding that the appellants' cause of action abated.

(2) The Court below erred in holding that the appellants' right of action abated.

(3) The Court below erred in vacating the order of a court of parallel jurisdiction.

Two issues are raised by the specifications of error.

(1) Did the action abate when the plaintiff failed to move to substitute the defendant within six months after J. Howard McGrath vacated office?

(2) Did the judge in the Court below err in vacating the prior order granting substitution and thereafter entering an order dismissing the complaint?

ARGUMENT.

I.

THE ACTIONS ABATED SIX MONTHS AFTER J. HOWARD McGRATH VACATED THE OFFICE OF ATTORNEY GENERAL AND THEREFORE THE ORDERS OF DISMISSAL WERE NOT IN ERROR.

The appellants herein filed their actions under Section 503 of the Nationality Act of 1940, 8 U.S.C. 903, which provides:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, *may institute an action against the head of such Department or agency* in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such

person claims a permanent residence for a judgment declaring him to be a national of the United States." (Italics ours.)

Appellants were excluded by final action of the Immigration and Naturalization Service. This Service is operated under the Department of Justice, of which the Attorney General is the head. The appellants' action was filed against J. Howard McGrath, who was then Attorney General of the United States, alleging that employees of the Department headed by the Attorney General had denied a right or privilege to the appellants, who claimed such right or privilege as nationals of the United States. Appellants contend, first, that the United States is the true party in interest; second, that jurisdiction is directed to the Attorney General of the United States, and not to that particular person acting in that capacity.

1. There has been no consent to sue the United States.

The United States of America may be sued only when consent thereto has been given. Congress has the power to prescribe the terms and conditions upon which the United States may be sued.

United States v. Sherwood, 312 U.S. 584;
United States v. U.S. Fidelity and Guaranty Co., 309 U.S. 506;
State of Minnesota v. United States, 305 U.S. 382;
Schillinger v. United States, 155 U.S. 163;
Price v. United States, 174 U.S. 373.

The sovereignty of the United States raises the presumption against its suability unless it is clearly shown.

Eastern Transp. Co. v. United States, 272 U.S. 675;

United States v. Michel, 282 U.S. 656.

There has been no consent to sue the United States under the provision of Title 8 U.S.C. 903.

Savorgnan v. United States, 338 U.S. 491.

Appellants in the above appeal and appellants in Nos. 13992, 13993 and 13994, *Wong Wing Foo, Lew Shek Shan,* and *Wong Ying v. McGrath,* have laid heavy emphasis on the 903 action as a suit against the United States. The words of Judge Goodman in *Ly Shew v. Acheson,* 110 F. Supp. 50, are quoted in both briefs.[2]

Page 53:

> "Despite the fact that the Secretary of State is party defendant in every real sense, the people of the United States are defendants."

Appellants have failed to understand the import of those words.

There can be no question in this Court's mind as to consent of the sovereign to be sued. *The 903 action cannot be maintained against the United States.*

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[2]Page 5 of appellants' brief (top of page) contains a quotation purportedly from Judge Goodman's opinion in the Ly Shew case. Just where this sentence is to be found is not disclosed either in the brief or the opinion. The correct quotation follows above.

Judge Goodman's remark does not imply, suggest, or in any way state that the action could be maintained against the United States. He has simply pointed to the ultimate fact that the people of the United States, the citizens of the body politic, are the ones who are primarily concerned with the determination of nationality or citizenship; all of which goes to the question of jurisdiction of the District Court to entertain an action under Section 903 filed by a person, or in his behalf, who has never been in the United States.

At page 55 of the *Ly Shew* case, Judge Goodman stated:

> "There is no doubt about the Congressional intent to allow any person *in the United States* to bring suit under Section 903, if any of his rights or privileges as a citizen are denied. But as to those abroad, the objective of the statute is clearly in aid of those charged with expatriation. There is not the slightest evidence that the Congress ever intended Section 903 to encompass a declaratory proceeding to determine the identity of claimants such as plaintiffs."

The appellants herein are in the same status as plaintiffs in the *Ly Shew* case. To contend that the suit is really against the United States in effect concedes appellee's contention that the District Court was without jurisdiction in the beginning.

Quon Quon Poy v. Johnson, 273 U.S. 352.

The jurisdictional question has been briefed by appellee in the case of *Fong Wone Jing v. Dulles,* No.

13745, and *Ly Shew v. Dulles,* No. 13808, also in *Chow Sing v. Brownell,* No. 13746, all pending in this Court.

2. The action is against the Attorney General in person and not against the office.

Appellants seek to avoid compliance with Rule 25(d) of the Rules of Civil Procedure by contending that the office of the Attorney General exists separate and apart from the Attorney General in person. There is no merit to this contention.

United States ex rel. Claussen v. Curran, 276 U.S. 590;

Snyder v. Buck, 340 U.S. 15;

United States ex rel. Trinler v. Carusi, 168 F. 2d 1014, C.A. 3;

Albert Hermann Lehmann v. Acheson, C.A. 3 No. 11035, C.A. 3, July 29, 1953, order vacating judgment 206 F. 2d 592 and remanding case to the District Court with direction to dismiss the cause as abated;

Rossello v. Marshall, 12 F.R.D. 352, S.D.N.Y. Jan. 1952;

Gambardelli v. Clark, 10 F.R.D. 44, E.D. Penn. Feb. 1950.

II.

THE COURT BELOW DID NOT ERR IN VACATING THE ORDER GRANTING SUBSTITUTION AND IN ORDERING THE COMPLAINT DISMISSED.

Appellants do not question the power of the District Court to vacate an order or judgment.

Bowles v. Wilke, 175 F. 2d 35;

Messinger v. Anderson, 225 U.S. 436.

But say the remaining question is (page 8 of brief):

> "A judge of the District Court may vacate an interlocutory order if in the interests of justice the ends of proper relief may be best served to the parties."

The point on appeal specified is:

> "(3) The Court below erred in vacating the order of a Court of parallel jurisdiction."

Appellants continue on page 8 of the brief:

> "Appellant does not attempt to enter into the question of the right or power of a Court of *inferior* jurisdiction to vacate an order of a Court of *parallel* jurisdiction, but rather whether or not the action of the inferior Court in the instant matter was proper under the all prevailing circumstance to set aside an order of an *inferior* Court of *equal* jurisdiction on the identical matter." (Emphasis ours.)

Appellee is not quite able to unscramble the foregoing, but believes that the heading of this Section II above states what appellants have in mind. The order of the Court dismissing the complaint is before this

Court, assuming it is an appealable order. If this Court reverses, the purpose of the appeal will have been accomplished. If the order is sustained, the action abated and the order allowing the substitution was error. There is no merit to the point or question or whatever it is.

CONCLUSION.

The appellee respectfully submits that the order of the Court below should be affirmed.

Dated, San Francisco, California,
February 5, 1954.

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